IN THE SUPREME COURT OF THE STATE OF NEVADA

EUREKA COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA; KENNETH F. BENSON, INDIVIDUALLY; DIAMOND CATTLE COMPANY, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND MICHEL AND MARGARET ANN ETCHEVERRY FAMILY, LP, A NEVADA REGISTERED FOREIGN LIMITED PARTNERSHIP,

Appellants,

vs.

THE STATE OF NEVADA STATE ENGINEER; THE STATE OF NEVADA DIVISION OF WATER RESOURCES; AND KOBEH VALLEY RANCH, LLC, A NEVADA LIMITED LIABILITY COMPANY,

Respondents.

_____/

No. 61324

District Court Case Nos. CV 1108-155; CV 1108-156; CV 1108-157; CV 1112-164; CV 1112-165; CV 1202-170

APPELLANT EUREKA COUNTY'S REPLY BRIEF TO RESPONDENTS' ANSWERING BRIEFS

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Appellant, EUREKA COUNTY, by and through its counsel, ALLISON, MacKENZIE, PAVLAKIS, WRIGHT & FAGAN, LTD., and THEODORE BEUTEL, ESQ., EUREKA COUNTY DISTRICT ATTORNEY, hereby files its Reply Brief in response to the Answering Briefs filed by Respondent, KOBEH VALLEY RANCH (hereinafter "KVR") and Respondent,

THE STATE OF NEVADA STATE ENGINEER (hereinafter "STATE ENGINEER").

I.

EUREKA COUNTY'S REPLY ARGUMENT IN RESPONSE TO RESPONDENTS' ANSWERING BRIEFS

EUREKA COUNTY's position is simple and straightforward—KVR's proposed pumping of 11,300 acre feet annually ("afa") of groundwater conflicts with existing senior rights and NRS 533.370(2) requires that KVR's Applications, as currently filed, be rejected. The STATE ENGINEER and KVR incorrectly argue that EUREKA COUNTY is taking a "no impacts" position and is against groundwater development. EUREKA COUNTY is taking a "no conflicts" position in accordance with Nevada law. Furthermore, the Respondents' argument ignores the evidence in this case of quantified impacts to existing senior water rights from KVR's proposed pumping. See JA Vol. 2 at 338-339, 363, 373-374; JA Vol. 3 at 531, 544-545 (testimony of KVR's experts that existing water rights, i.e., springs and stockwatering wells, would dry up or cease to flow as a result of KVR's proposed pumping).

EUREKA COUNTY believes that a junior appropriator's pumping that will ***dry up*** existing water rights is a conflict—plain and simple. If drying up existing

water rights is not a conflict, as KVR and the STATE ENGINEER assert, there will never be a conflict under NRS 533.370(2) by an applicant's proposed use.

The STATE ENGINEER and KVR argue that all pumping in a basin necessarily impacts other water rights to some extent. This is a theoretical argument that fails to quantify impacts and does not reflect the facts of this case. Further, EUREKA COUNTY's position will not stop groundwater development in Nevada. As evidenced by the record in this case, KVR has had tremendous difficulty in finding groundwater to appropriate in the Kobeh Valley Hydrographic Basin (hereinafter "Kobeh Valley"). KVR's failure to locate water to develop in this groundwater basin without drying up existing rights does not require that NRS 533.370(2) be disregarded.

This Court's attention should not be diverted by the policy arguments the Respondents would like the law to be. Instead, this Court should properly focus on the applicable law and facts of this case and clarify the authority granted by law to the STATE ENGINEER. EUREKA COUNTY's position that a junior appropriator's proposed pumping which dries up existing water rights is a conflict under NRS 533.370(2) is consistent with the plain language of the statute, Nevada and federal case law, and preserves the prior appropriation doctrine.

In this appeal, EUREKA COUNTY is requesting that this Court apply the plain language of NRS 533.370(2) to the facts of this case. If this Court agrees with Appellants' position and reverses the District Court's judgment and vacates the STATE ENGINEER's Ruling 6127, KVR can still proceed with its project. KVR simply must either: (1) reconfigure the points of diversion of its proposed wells to eliminate the conflicts; (2) reduce the size of its project or improve water-use efficiency to eliminate the conflicts; or (3) work cooperatively with senior water rights holders to resolve the conflicts before KVR's Applications are considered and approved by the STATE ENGINEER. Further, the STATE ENGINEER will have clear direction on the mandates of NRS 533.370(2) and his authority to approve applications.

A. The Facts of This Case Show That KVR Has Continued to Struggle in Finding Points of Diversion in Kobeh Valley That Do Not Conflict With Existing Senior Rights.

KVR and the STATE ENGINEER argue that EUREKA COUNTY's position in this appeal means no new groundwater development in Nevada. This argument is baseless and ignores the facts of this case.

As early as the 2008 hearing, KVR's expert acknowledged that Kobeh Valley has proven to be a difficult basin to develop water. EUREKA COUNTY's Reply Appendix ("RA") at 40-46; JA Vol. 36 at 6958-6959. The size and area of

Kobeh Valley is vast—encompassing 868 square miles, or 555,520 acres.[1] JA Vol. 16 at 2760. The difficulty in finding water in Kobeh Valley is evidenced by KVR's filing of more than one hundred applications since 2005 to find water for the Mount Hope Mine Project, and the number of years KVR has expended in conducting exploratory drilling in Kobeh Valley. JA Vol. 7 at 1175, 1199; JA Vol. 13 at 2111-2326; JA Vol. 14 at 2327-2460; JA Vol. 16 at 2733-2734; JA Vol. 26 at 4985-4988, 4994. Because of its inability to find water in Kobeh Valley, KVR has had to continually change the location of its points of diversion for its well field for the mining project. JA Vol. 23 at 4408. At the 2010 hearing, KVR was still not able to state with certainty the number of production wells and their location necessary to provide water for the mining project. JA Vol. 3 at 426; JA Vol. 9 at 1539-1540.

In addition to the difficulty in just finding water in Kobeh Valley, KVR has not been successful in finding water to appropriate in Kobeh Valley that does not conflict with existing rights.[2] As testified to by KVR's experts before the STATE

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[1] See the State of Nevada Division of Water Resources website at http://water.nv.gov/mapping/ for a map of Nevada's Hydrographic Regions, Basins and Sub-Basins showing the size and area of Kobeh Valley.

[2] At the 2008 hearing, KVR's expert hired to assist in the development of a water supply for the mine testified that "based on a lot of experience in Nevada, it's one thing to go get that water. It's another thing to get that water without

ENGINEER, the current location of KVR's well field is in close proximity to existing water rights such that springs will dry up and cease to flow as a result of KVR's pumping. JA Vol. 2 at 338-339, 363, 373-374; JA Vol. 3 at 531, 544-545; JA Vol. 9 at 1687a-1687d.

Each hydrographic basin in Nevada is unique and the STATE ENGINEER has taken the position that development of water in each basin must be administered and managed on a basin by basin approach. RA at 01, 55-56. The STATE ENGINEER determines the perennial yield of each basin, prior to granting an application, and then, to maintain the natural recharge of the basin, prohibits appropriation in excess of the perennial yield.[3] JA Vol. 26 at 4997-4998.

KVR has had trouble capturing the unappropriated perennial yield of Kobeh Valley. RA at 47-52. JA Vol. 2 at 369-371. In Ruling 6127, the STATE ENGINEER revised the perennial yield of Kobeh Valley from 16,000 afa to 15,000 afa. JA Vol. 26 at 4999. In order for the basin to remain in balance, the natural discharge (phreatophyte evapotranspiration) must be captured. JA Vol. 26 at 4997-4999. Nonetheless, based upon KVR's own expert testimony "[t]he

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unacceptable levels of adverse impacts." JA Vol. 36 at 6957-6959.

[3] "The perennial yield of a groundwater reservoir may be defined as the maximum amount of groundwater that can be salvaged each year over the long term without depleting the groundwater reservoir." JA Vol. 26 at 4997.

perennial yield of Kobeh Valley, based on the Rush and Everett (1964) Reconnaissance Report is approximately 16,000 af/yr, which assumes that the natural groundwater discharge (phreatophyte evapotranspiration) from the basin can be captured over the long-term." (Emphasis added). RA at 02, 47-52. KVR's expert in hydrogeology agreed that the perennial yield of 16,000 afa required capturing the phreatophyte evapotranspiration. RA at 47-52. KVR's expert further testified that KVR will not capture the required phreatophyte evapotranspiration. JA Vol. 2 at 369-371; RA at 03-04, 53-54. In order to avoid conflicts with existing water rights holders, KVR could apply for groundwater rights with points of diversion and pumping located in phreatophytic areas in Kobeh Valley to capture the natural discharge in Kobeh Valley.[4] Any argument that EUREKA COUNTY's position in this case precludes groundwater development in Nevada ignores the difficulties KVR has had in locating water in Kobeh Valley that does not conflict with existing rights.

B. EUREKA COUNTY's Interest in This Appeal is Proper Because the STATE ENGINEER and the District Court Failed to Protect Existing Water Rights Holders in the County.

KVR asserts that EUREKA COUNTY has no interest in this appeal because it has no water rights affected by Ruling 6127, and the STATE

[4] If the natural discharge is captured, no other water sources (i.e., rights) can be using the water because the phreatophytes are already consuming the

ENGINEER ordered a monitoring, management, and mitigation plan to be prepared by KVR in cooperation with EUREKA COUNTY. KVR's assertion lacks merit.

EUREKA COUNTY's interest in this case is that, as a political subdivision of the State of Nevada, it has an obligation to protect the health, welfare and safety of its residents. See State v. District Court, 101 Nev. 658, 663, 708 P.2d 1022, 1025 (1985). Because of the essential character of water as a natural resource for its residents, EUREKA COUNTY has an interest in the process by which that natural resource is protected and allocated and, specifically, in how the STATE ENGINEER and the Courts interpret and apply Nevada water law.

Counties are statutorily authorized to adopt master plans which may provide for, among other things, "the conservation, development and utilization of natural resources, including, without limitation, water and its hydraulic force, underground water, [and] water supply." NRS 278.160(1)(b); see also NRS 278.250(2)(a) and (b). As provided by these statutes, as well as other applicable statutes such as NRS 278.243,[5] EUREKA COUNTY has adopted a Master Plan

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groundwater in concert with existing senior water rights.

[5] NRS 278.243 states that a "county whose governing body has developed a master plan pursuant to NRS 278.220 may represent its own interests with respect

which addresses EUREKA COUNTY's policies relating to water resources, natural resources, mining and property rights in EUREKA COUNTY. JA Vol. 15 at 2649-2714.

In furtherance of its Master Plan, over the last eight years and before the Mount Hope Project was proposed, EUREKA COUNTY contracted with the United States Geological Survey ("USGS") to study and define the available water resources of the Diamond Valley Flow System, which includes Kobeh Valley and Diamond Valley. JA Vol. 15 at 2607-2641. EUREKA COUNTY contracted for this work to be proactive and to use the best available science in the evaluation of projects using large quantities of water so that more informed decisions are made with regard to water development in the basins comprising the Diamond Valley Flow System. JA Vol. 15 at 2607-2641.

In addition, EUREKA COUNTY has senior groundwater and surface water rights in the Diamond Valley Hydrographic Basin that it uses to provide water service to the residents of the Town of Eureka and the Devil's Gate General Improvement District. JA Vol. 4 at 688. Under the STATE ENGINEER's present interpretation of NRS 533.370(2), EUREKA COUNTY's senior water rights may be impaired by a future junior appropriator so long as the

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to land and appurtenant resources that are located within the city or county and are

junior appropriator simply tells the STATE ENGINEER that it will mitigate such conflicts without supporting evidence. There are no State laws providing direction, or rules or regulations developed by the STATE ENGINEER providing for mitigation, specifying what must be included in an effective mitigation plan or ensuring that, or detailing how, impaired senior rights are satisfied. Because there are no laws, rules or regulations, EUREKA COUNTY has an interest in ensuring that senior water rights holders in EUREKA COUNTY, including EUREKA COUNTY itself, and water dependent natural resources in EUREKA COUNTY are adequately protected by any law adopted by the Legislature and construed by the STATE ENGINEER.

C. The STATE ENGINEER's Answering Brief Attempts to Circumvent Nevada Water Law to Expand His Authority to Grant Applications Contrary to the Plain Language of NRS 533.370(2).

It is important to note that in his Answering Brief, the STATE ENGINEER fails to address EUREKA COUNTY's legal argument regarding lack of express and implied authority to approve applications that conflict with existing rights on the basis of future mitigation. Instead of addressing the mandates of NRS 533.370(2), the STATE ENGINEER circumvents the issue by asserting that KVR's pumping will not conflict with existing rights because he made a "factual

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affected by policies and activities involving the use of federal land."

determination that no conflict with existing rights is present when the full extent of a senior water right's beneficial use can be satisfied." See STATE ENGINEER's Answering Brief at pages 14-15. The STATE ENGINEER misinterprets the statutory standard set forth in NRS 533.370(2) and improperly presents the issue to the Court as a deferential factual determination the STATE ENGINEER can make as follows: "[M]ay the State Engineer find there is no conflict with existing (senior) rights when a junior appropriator is required to fully mitigate any impacts to those rights?" See STATE ENGINEER's Answering Brief at page 14.

The STATE ENGINEER's argument ignores the plain language of NRS 533.370(2) which mandates that applications with a proposed use that conflicts with existing rights be rejected by the STATE ENGINEER. There is no mention of mitigation in NRS 533.370(2). There is no mention in NRS 533.370(2) of any authority for the STATE ENGINEER to find there is no conflict with existing (senior) rights when a junior appropriator promises to "fully mitigate" any impacts to those senior rights. In reviewing NRS 533.370(2), this Court has never articulated or even hinted that the interpretation urged by the STATE ENGINEER was appropriate. See Pyramid Lake Paiute Tribe v. Ricci, 126 Nev. ___, ___ 245 P.3d 1145, 1146 (2010) ("The State Engineer is prohibited by law from granting a permit under a change application to appropriate public waters if: . . . the 'proposed

use or change conflicts with existing rights . . . .'") (quoting NRS 533.370(3), now codified as NRS 533.370(2)). See also Desert Irrigation, Ltd. v. State of Nevada, 113 Nev. 1049, 1051 n.1, 944 P.2d 835, 837 n.1 (1997); State Engineer v. Morris, 107 Nev. 699, 701, 819 P.2d 203, 204 (1991). Further, this Court is free to review purely legal questions without deference to the STATE ENGINEER's Ruling. See Pyramid Lake Paiute Tribe v. Ricci, 126 Nev. at _____, 245 P.3d at 1148.

Here, evidence was presented to the STATE ENGINEER (by KVR's own experts) that springs and stockwater wells on the valley floor and in the alluvial system would dry up or cease to flow as a result of KVR's proposed pumping. JA Vol. 2 at 338-339, 363, 373-374; JA Vol. 3 at 531, 544-545. KVR's expert testimony was not disputed. Thus, the undisputed, quantified evidence of known conflicts to existing rights is present in this case. As stated by this Court in Pyramid Lake Paiute Tribe v. Ricci, the STATE ENGINEER was prohibited by law from granting KVR's Applications because the proposed use or change conflicts with existing rights.

D. KVR's Answering Brief Contains Numerous Misrepresentations Regarding the Evidence Presented to the STATE ENGINEER and the Findings Made by the STATE ENGINEER in Ruling 6127.

In its Answering Brief, KVR argues at length that the STATE ENGINEER's findings in Ruling 6127 are supported by substantial evidence and that Appellants

presented no evidence to the contrary. As set forth in detail below, KVR's argument is unfounded.

1. KVR Misconstrues the Record in Claiming That the STATE ENGINEER Found That Only Two Springs and a Domestic Well Would be Impaired by KVR's Pumping.

In its Answering Brief, KVR asserts that the STATE ENGINEER found "that only two springs were likely to be affected by KVR's pumping" being Mud Spring and Lone Mountain Spring, and "that a domestic well at Etcheverry's Roberts Creek Ranch may be impacted." See KVR's Answering Brief at pages 5-6. This assertion, however, is a mischaracterization of the STATE ENGINEER's findings in Ruling 6127 and the evidence cited by the STATE ENGINEER in the Ruling.

Nowhere in Ruling 6127 does the STATE ENGINEER make a finding that "only two springs" will likely be affected by KVR's pumping. Instead, in Ruling 6127, the STATE ENGINEER acknowledges that "several small springs located on the valley floor of Kobeh Valley near the proposed well locations" will be negatively impacted by KVR's pumping. JA Vol. 26 at 5005-5006, 5011. Several, by definition, are more than two.[6] If it were simply two springs, the STATE

[6] The word "several" is defined as "[b]eing of a number more than two or three but not many." The American Heritage Dictionary College Dictionary 1248 (3d ed. 1997).

ENGINEER would have so stated in Ruling 6127. The evidence cited to in the administrative record by the STATE ENGINEER in Ruling 6127 is Mr. Katzer's testimony that stockwatering wells and springs in the valley floor of Kobeh Valley are in close proximity to the well field and will dry up or cease to flow. JA Vol. 2 at 338-339, 363, 373-374; JA Vol. 26 at 5005-5006, 5011.

In Ruling 6127, the STATE ENGINEER stated: "The Applicant's groundwater flow model indicated water level decline attributable to these applications is significant in the well field area in Kobeh Valley and at the open pit mine." JA Vol. 26 at 5003 (emphasis added). The STATE ENGINEER also notes that KVR's water level drawdown maps only show drawdown of ten feet or more. JA Vol. 26 at 5003-5004. Even using KVR's drawdown maps of ten feet, Ruling 6127 states that "[t]he Applicant [KVR] recognizes that certain water rights on springs in Kobeh Valley are likely to be impacted by the proposed pumping." JA Vol. 26 at 5006. In Ruling 6127, the STATE ENGINEER acknowledges as follows:

> Protestant Eureka County presented a comprehensive case with numerous witnesses and accompanying exhibits. . . . Witnesses included Martin Etcheverry, owner of the Roberts Creek Ranch, Jim Etcheverry, owner of the 3-Bar Ranch, and John Colby, owner of the MW Cattle Company and the Santa Fe/Ferguson grazing allotment. Those three ranchers utilize available surface waters across the grazing

> allotments and own a variety of surface and groundwater rights in Kobeh Valley. The groundwater flow model predicts water table drawdown at the end of mine life of three feet or more in the general area of Kobeh Valley north of U.S. Highway 50 and east of 3-Bars Road. This includes the well field area, where drawdown is extensive. Drawdown of ten feet or less extends westerly to the Bobcat Ranch and southerly to the Antelope Valley boundary. Water rights that could potentially be impacted are those rights on springs and streams in hydrologic connection with the water table. That would include valley floor springs.

JA Vol. 26 at 5005 (emphasis added). Thus, the Ruling itself and the testimony relied upon by the STATE ENGINEER do not limit the impacts to two springs and a domestic well. KVR's attempt to downplay the extent of the impacts to two springs and a domestic well is not supported in the record and is without merit.

2. The Evidence in the Record Does Not Support the STATE ENGINEER's Finding of Minimal Flows.

Although the STATE ENGINEER determined that several springs located on the valley floor of Kobeh Valley would be impaired by KVR's pumping, the STATE ENGINEER summarily concluded that "[t]hese small springs are estimated to flow less than 1 gallon per minute." JA Vol. 26 at 5006, 5011. Based on the "less than 1 gallon per minute" measurement, the STATE ENGINEER found "that this flow loss can be adequately and fully mitigated by the Applicant

should predicted impacts occur." JA Vol. 26 at 5006. Likewise, under the interbasin transfer section of the Ruling, the STATE ENGINEER stated as follows:

> Because these springs exist in the valley floor and produce minimal amounts of water, any affect caused by the proposed pumping can be easily mitigated such that there will be no impairment to the hydrologic related natural resources in the basin of origin. The monitoring, management and mitigation plan will allow access for wildlife that customarily uses the source and will ensure that any existing water rights are satisfied to the extent of the water right permit.

JA Vol. 26 at 5011. There is no discussion on how to mitigate and no information to support if mitigation is possible.

In support of his conclusion that the springs in Kobeh Valley produce flows of "less than 1 gallon per minute" or produce "minimal amounts of water," the STATE ENGINEER cites to "Exhibit No. 116, Appendix B, October 2008." JA Vol. 26 at 5006, 5011. See also STATE ENGINEER's Answering Brief at pages 10-11. A review of Exhibit No. 116, Appendix B, October 2008, entitled "Spring Inventory Dataset" shows that it is an 11-page inventory including more than 200 springs with many in Kobeh Valley but dozens located in numerous hydrographic basins other than Kobeh Valley, including Diamond Valley, Huntington Valley, Antelope Valley, Little Smoky, and Pine Valley. RA at 05-15. This inventory was prepared and submitted by KVR as part of the 2008 hearing before the STATE

ENGINEER. The one-time measurement for each spring in Kobeh Valley occurred later in the year, mostly in October of 2007. RA at 09-12. The vast majority of measurements for these springs do not list the flow. RA at 09-12. For example, Mud Spring is listed on page 7 of the inventory at 151. RA at 11. The measured flow for Mud Spring is blank, but the notes state: "Source ponded, no flow available." RA at 11. Thus, the evidence cited by the STATE ENGINEER does not support any conclusion that "[t]hese small springs are estimated to flow less than 1 gallon per minute" or that the springs produce "minimal amounts of water" that can be adequately and fully or easily mitigated. This is not "substantial evidence" which the Court has defined as that which a "reasonable mind might accept as adequate to support a conclusion." State Employment Security Dept. v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986). Because there are no measurements for many of the springs listed and it is not clear what part of the 11 page, 200 spring dataset the STATE ENGINEER relied upon for his conclusions, both the STATE ENGINEER's decision and the record lack specificity. This lack of specificity is a fundamental defect which a reasonable mind would not accept as adequate to support the conclusion that the STATE ENGINEER made regarding full or easy mitigation of "flow less than 1 gallon per minute" or springs that produce "minimal amounts of water". See Bacher v. State Engineer, 122 Nev.

1110, 1122-1123, 146 P.3d 793, 801 (2006) (concluding that because both the State Engineer's decision and the record suffer from a fundamental defect in that neither specifies how much afa of water was required, a reasonable mind could not accept as adequate the State Engineer's finding of the need to import water). Thus, the STATE ENGINEER abused his discretion in concluding spring flow was minimal and that the spring flow loss could be adequately and fully or easily mitigated.

Further, in contrast to the inventory prepared by KVR for the 2008 hearing before the STATE ENGINEER, KVR prepared a basin inventory dated June 16, 2011 as required by NRS 533.364.[7] JA Vol. 30 at 5502-5701. The 2011 inventory prepared by KVR contains more detailed information regarding the flow and dates of measurement for the many springs in Kobeh Valley. JA Vol. 30 at 5502-5701. For example, Mud Spring is listed in the 2011 inventory as being used for

[7] The 2009 Nevada Legislature adopted Assembly Bill 416 which created NRS 533.364. 2009 Nev. Stat., ch. 165 § 4, at 595-96. NRS 533.364 requires the completion of an inventory of the surface and groundwater appropriated or available for future appropriation in any basin for which an application proposes an interbasin transfer of more than 250 afa of groundwater. KVR's Applications propose to transfer in excess of 250 afa of groundwater from Kobeh Valley for use in Diamond Valley. Despite the fact that NRS 533.364 was triggered by KVR's Applications, no inventory was produced at the hearings on this matter for review and consideration by the parties. Instead, following prompting by the STATE ENGINEER, KVR completed an inventory and submitted the same directly to the STATE ENGINEER with no copies to the other parties after the 2010 hearings had

stockwatering purposes with a flow of less than 5 gallons per minute on May 17, 2011, with comments of "depression with ponded water and well casing; flow visually estimated" and notations of observed (apparent) stockwater use. JA Vol. 30 at 5514, 5544-5545. This later KVR flow measurement of less than 5 gallons per minute directly contradicts the "less than 1 gallon per minute" or "minimal" flow conclusions the STATE ENGINEER made in the Ruling. Although more current information and dates of measurement were available in the 2011 inventory prepared by KVR, the STATE ENGINEER did not cite to this inventory in Ruling 6127 to support his conclusion as to the volume of flow loss and that mitigation would be effective. The STATE ENGINEER only cites to the general, overly broad 2008 inventory in Ruling 6127. JA Vol. 26 at 5006, 5011. The STATE ENGINEER is encouraged to consider the best available science in rendering decisions concerning the available sources of water in Nevada. See NRS 533.024(1)(c). The 2008 inventory was not the best available science for use by the STATE ENGINEER and his reliance on the 2008 inventory was misplaced.

Further, a review of the Mud Spring existing water right shows that the application (Application 12748) was filed in 1948, and that the certificate (Certificate 5580 currently owned by the Etcheverry Family Limited Partnership)

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concluded. JA Vol. 29 at 5429-5430, 5497-5501.

was issued in 1965. JA Vol. 2 at 195; JA Vol. 30 at 5510, 5514, 5544-5545. The amount of appropriation under Certificate 5880 for Mud Spring is 0.015 cfs, or sufficient water for 500 cattle, 5,000 sheep and 50 horses. JA Vol. 2 at 195. Moreover, a conversion of 0.015 cfs to gallons per minute is 6.732 gpm and to acre feet annually equates to 10.86 afa.[8] JA Vol. 30 at 5510; JA Vol. 35 at 6662. So, while the 2011 inventory prepared by KVR may list the flow for Mud Spring as being less than 5 gallons per minute as of May 17, 2011, the existing water right is 10.86 afa and allows water sufficient to water 500 cattle, 5,000 sheep and 50 horses and is permitted for year-round use. JA Vol. 2 at 195; JA Vol. 30 at 5510, 5514, 5544-5545. KVR's 2011 inventory also quantified the certificated right for Mud Spring (Certificate 5880) as 10.86 afa. JA Vol. 30 at 5510, 5514. See Anderson Family Associates v. Ricci, 124 Nev. 182, 188-89, 179 P.3d 1201, 1204-1205 (2008) (setting forth this Court's discussion of the different types of water rights in Nevada—vested, permitted, and certificated).

Additionally, Certificate 1986 (Application 4768) was issued in 1933 and is for an unnamed spring near KVR's proposed pit area. JA Vol. 35 at 6663. Based on KVR's model report (Table 4.4-9 and Table 4.4-10), this existing right is

[8] The water under Certificate 5880, being 10.86 afa, is enough for five households each using a domestic well water rate of 2 afa. JA Vol. 30 at 5510; JA Vol. 35 at 6662.

predicted to have a water level drawdown of 51 feet at the end of the mine life due to KVR's pumping and that water levels will not recover to the point the spring will ever resume flowing. JA Vol. 9 at 1687a, 1687d; JA Vol. 35 at 6663. The STATE ENGINEER acknowledged in Ruling 6127 that drawdown in the pit area would be significant. JA Vol. 26 at 5003. The amount of appropriation under Certificate 1986 is 0.1 cfs, or 72.35 afa, with a priority date of December 8, 1917.[9] JA Vol. 9 at 1687a; JA Vol. 35 at 6663-6664. It is not clear if this is one of the "several springs" that the STATE ENGINEER summarily concluded flowed less than 1 gallon per minute and could be adequately and fully mitigated. The works of diversion, the manner and place of use are stated in Certificate 1986 as follows: "A dam is constructed across the channel heading from the spring creating a reservoir. The water is conveyed from the reservoir by means of a one-and-a-half-inch pipe to troughs located in the same legal subdivision as the point of diversion." JA Vol. 35 at 6664. When this water right was granted almost 100 years ago–after the applicant expended time, effort, and money to put the water to beneficial use–there was no way that this water right holder could expect that the STATE ENGINEER would tell him in 2011, through Ruling 6127, that the water

[9] The water under Certificate 1986, being 72.35 afa, is enough for 36 households each using a domestic well water rate of 2 afa. JA Vol. 9 at 1687a; JA Vol. 35 at 6662.

right holder was not going to get his water right from this unnamed spring through the proposed works of diversion that he had proved up to the STATE ENGINEER. JA Vol. 35 at 6664.

This case is so important to EUREKA COUNTY because of the unprecedented findings made by the STATE ENGINEER in Ruling 6127 regarding senior water rights holders having to rely on a future, undefined mitigation plan to receive and protect their existing water rights. Ruling 6127 creates, instead of alleviates, additional legal contests for existing water rights holders.

3. KVR is Misrepresenting the Evidence Presented to the STATE ENGINEER When It Claims that EUREKA COUNTY Presented No Evidence of Quantified Impacts Other Than Two Springs and a Domestic Well.

In its Answering Brief, KVR wrongly asserts that EUREKA COUNTY "presented no evidence to the contrary" that no more than two springs and a domestic well would be impacted by KVR's pumping. See KVR's Answering Brief at page 31. Again, this is a misrepresentation of the evidence presented to the STATE ENGINEER.

At the hearing before the STATE ENGINEER, EUREKA COUNTY presented the expert testimony of its hydrogeologist who provided a report and figures showing quantified impacts to existing water sources with associated rights,

primarily on the valley floor, using KVR's numeric groundwater flow model with a 5-foot drawdown contour. JA Vol. 6 at 1067-1079; JA Vol. 24 at 4688-4689; JA Vol. 25 at 4750, 4752. The 5-foot drawdown contour depicts additional existing water rights other than the water rights identified by KVR subject to impairment as a result of KVR's proposed pumping. JA Vol. 24 at 4688-4689; JA Vol. 25 at 4750, 4752.[10]

Additionally, extensive evidence was presented to the STATE ENGINEER to show that, in addition to Mud Spring, other springs and creeks in the alluvial system would be impacted—likely dried up entirely—by granting KVR's Applications. JA Vol. 2 at 338-339, 363, 373-374; JA Vol. 3 at 525, 531, 544-545; JA Vol. 9 at 1687a-1687d. There would also be quantified impacts to stockwatering wells and at least one domestic well in the alluvial system. JA Vol.

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[10] KVR utilized a 10-foot drawdown contour to assess impacts associated with KVR's proposed use of water. The decision to use the 10-foot drawdown contour instead of a different drawdown contour (for example, the 5-foot drawdown contour proposed by EUREKA COUNTY) does not ensure that there will not be additional impacts which are not anticipated by KVR's 10-foot drawdown contour. See Cappaert v. United States, 426 U.S. 128, 141 (1976) (concluding that increased pumping of the groundwater from nearby wells that lowered the water level in an underground pool by approximately two feet was impairing the scientific value of the pool and the pupfish sought to be preserved such that the pumping needed to be enjoined). Moreover, KVR's decision to use the 10-foot drawdown contour was not based on any scientific reason but was instead made simply because the 10-foot drawdown contour had been utilized in filings with the Bureau of Land Management ("BLM"). JA Vol. 2 at 332.

2 at 363, 373-374; JA Vol. 3 at 535-536; JA Vol. 9 at 1552c. Such springs and creeks and the wells are subject to vested, permitted or certificated water rights or domestic uses held by appropriators senior to KVR. JA Vol. 4 at 634-636, 638-641, 643, 664-665, 673-677; JA Vol. 25 at 4933; JA Vol. 26 at 4934-4938. Furthermore, KVR's claim that only two springs and a domestic well would be impaired by its pumping disregards the evidence before the STATE ENGINEER regarding claims to vested rights in Kobeh Valley and the information in KVR's own inventory dated June 16, 2011 submitted to the STATE ENGINEER. JA Vol. 30 at 5512-5520.

The inventory in the record prepared by KVR and dated June 16, 2011, has pictures taken by KVR of some of the springs claimed as vested rights. JA Vol. 30 at 5512-5513, 5530-5539, 5546-5551, 5554-5589, 5594-5617, 5622-5625, 5628-5633, 5636-5643, 5654-5659, 5664-5665, 5670-5679, 5684-5687, 5690-5691, 5694-5695, 5698-5699. However, the inventory does not include all of the claims for vested water rights in Kobeh Valley. JA Vol. 30 at 5506-5507. There are many nonadjudicated vested and reserved rights in Kobeh Valley. JA Vol. 30 at 5514-5520. Due to the amount of nonadjudicated vested and reserved rights in Kobeh Valley, the STATE ENGINEER failed to properly protect and ensure non-impairment by approving KVR's Applications without an understanding of all

rights that could be negatively impacted. The STATE ENGINEER should have adjudicated the vested and reserved rights in Kobeh Valley before granting KVR's Applications, or at a minimum, followed the process in NRS 533.095 calling for proofs of all claims so as to have a better understanding of potential impairment to those rights.

4. The STATE ENGINEER's Conclusion That Mitigation Would Protect Existing Water Rights is Not Supported by Substantial Evidence.

In its Answering Brief, KVR argues that none of the Appellants (including EUREKA COUNTY) offered any evidence to show that mitigation was not possible for the existing water rights. KVR even asserts that the Appellants conceded that mitigation was possible. See KVR's Answering Brief at page 8. Again, KVR misrepresents the evidence presented to the STATE ENGINEER. In fact, Ruling 6127 clearly states that EUREKA COUNTY requested that KVR's Applications be denied because of conflicts to existing rights and because "a mitigation plan to prevent impacts to existing users has not been provided." JA Vol. 26 at 5021. See also JA Vol. 2 at 194.

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a. KVR Presented No Evidence to the STATE ENGINEER to Show What a Proposed Mitigation Plan Would Entail.

EUREKA COUNTY's position in this appeal is that the STATE ENGINEER does not have the authority by law to rely on a future mitigation plan in order to approve applications that conflict with existing rights. If this Court identifies such authority, then, at the very least, the mitigation plan should be part of the administrative record. Further, the senior water rights holders that would be impaired must be included in the development of the mitigation plan and agree to it before the STATE ENGINEER rules on any applications. It is important that these basic procedural safeguards be in place to protect existing water rights holders. See Revert v. Ray, 95 Nev. 782, 787, 603 P.2d 264-65 (1979).

It is undisputed that KVR did not present evidence of a mitigation plan as part of the record before the STATE ENGINEER. JA Vol. 2 at 267-268, 305-306, 315; JA Vol. 5 at 902; JA Vol. 7 at 1240. In his Answering Brief, the STATE ENGINEER notes that "[n]o 3M plan existed at the time the applications were considered." See STATE ENGINEER's Answering Brief at page 33. Instead of providing details as to a possible mitigation plan, KVR gave subjective beliefs at the hearing speculating as to what mitigation might entail, for example,

augmenting a well, piping water from the distribution system, or trucking in water. JA Vol. 2 at 382; JA Vol. 3 at 489-490. None of the subjective testimony presented to the STATE ENGINEER, upon which he made conclusory findings in Ruling 6127, provided any further detail regarding the potential terms of a mitigation plan or that mitigation could or would be effective. See Newsweek Magazine v. District of Columbia Comm'n on Human Rights, 376 A.2d 777, 784-785 (D.C. 1977) (holding that conclusory findings based on testimony of subjective belief did not constitute substantial evidence).

In its Answering Brief, KVR argues that a mitigation plan cannot be "cast in stone" and that it must continue to change and evolve through the 44-year life of the project. See KVR's Answering Brief at page 36. Moreover, the STATE ENGINEER argues that he "must have the flexibility to respond" when impacts occur, and that he is not required to have a completed mitigation plan before ruling on KVR's Applications. See STATE ENGINEER's Answering Brief at pages 22 and 27. The Respondents' arguments only affirm the conclusion that mitigation is not feasible in this case in response to known impacts because there are no laws, rules or regulations providing for mitigation, specifying what must be included in an effective mitigation plan or ensuring that, or detailing how, impaired senior rights are satisfied by mitigation.

A mitigation plan that specifically identifies the foreseeable impacts and proposes specific courses of conduct to address those impacts, rather than relying on a speculative and undefined promise of future mitigation, could have been presented by KVR or could have been required by the STATE ENGINEER prior to the hearing. KVR chose not to put such a plan into evidence and the STATE ENGINEER erroneously concluded mitigation would be effective without any evidence or reasoning to support such a conclusion. This fundamental defect cannot be ignored because a mitigation plan may be proposed or amended in the future to address changing conditions and unknown impacts.

In Bacher v. State Engineer, 122 Nev. 1110, 1122 n.37, 146 P.3d 793, 801 n.37 (2006), this Court noted that speculative evidence of a development project was not sufficient to survive a substantial evidence inquiry on review. The future, undefined mitigation plan that was not part of the record relied on by the STATE ENGINEER in Ruling 6127 was too speculative for the STATE ENGINEER to conclude that conflicts with existing rights would be mitigated. Under Bacher, the undefined promise of future mitigation is not sufficient to survive a substantial evidence inquiry on review. Nowhere in the Ruling does the STATE ENGINEER describe what mitigation is, what is considered to be effective mitigation or how the full extent of a senior water rights holder's beneficial use is satisfied to

purportedly avoid a conflict pursuant to NRS 533.370(2). See also Wyoming Dep't of Transportation v. Legarda, 77 P.3d 708, 713 (Wyo. 2003) (concluding that it is insufficient for an administrative agency to state only an ultimate fact or conclusion because each ultimate fact or conclusion must be thoroughly explained in order for the reviewing court to determine upon what basis the ultimate fact or conclusion was reached). If mitigation is to be used to avoid conflicts with existing rights and junior appropriators are permitted to impair senior appropriators' water rights, including vested rights, then careful consideration must be given to the mitigation required so as to ensure that the basic foundation of Nevada water law—the prior appropriation doctrine—is not undermined.

b. Evidence Was Presented to the STATE ENGINEER to Show That Mitigation Would Not Be Possible to Protect Existing Water Rights.

The evidence presented to the STATE ENGINEER in this case shows that mitigation is not possible to protect existing water rights. First, KVR applied for and obtained, pursuant to Ruling 6127, 11,300 afa of water rights. JA Vol. 26 at 4985-4988, 5026. KVR indicated that it needed all 11,300 afa of water rights for its mining and milling activity. JA Vol. 26 at 5006. Thus, KVR has no water rights to use for mitigation.

Second, the STATE ENGINEER determined that the perennial yield of Kobeh Valley was 15,000 afa. JA Vol. 26 at 4999. The STATE ENGINEER found that the committed water rights in Kobeh Valley (including those held by KVR) total 12,400 afa. JA Vol. 26 at 5001, 5011. The STATE ENGINEER made no finding regarding any water being left for mitigation or that KVR has applied for additional water rights to be used for mitigation. Rather, the findings made by the STATE ENGINEER are limited to the following:

Perennial yield	15,000 afa
KVR's water rights for mining and milling	11,300 afa
Other committed rights	1,100 afa
Rights left in the basin for future growth and development	2,600 afa

JA Vol. 26 at 5001, 5011.

In addition, the STATE ENGINEER made no finding with respect to the nonadjudicated claims to vested or reserved rights in Kobeh Valley which would consume a portion, if not all, of the 2,600 afa of water the STATE ENGINEER identified as remaining unappropriated in Kobeh Valley. The quantity of the nonadjudicated claims to vested or reserved rights in Kobeh Valley on file in the STATE ENGINEER's Office per KVR's 2011 inventory is as follows:

Nonadjudicated claims to vested or reserved rights	5,530 afa

JA Vol. 30 at 5506-5507, 5512-5513. If the claims to vested and reserved rights in Kobeh Valley were either adjudicated, or at a minimum, preliminarily quantified through calling for proofs of claims pursuant to NRS 533.095, the remaining 2,600 afa of groundwater listed as available may not prove correct because the basin would be either fully or overappropriated or impairment would occur if the remaining water were developed.[11]

Third, most of the existing water rights to be impaired are springs and stockwatering wells located on federal land. JA Vol. 26 at 4934-4935, 4938. The STATE ENGINEER heard testimony that mitigation measures on federal land may require approval from the federal government pursuant to the National Environmental Policy Act ("NEPA"), potentially necessitating completion of an Environmental Assessment ("EA") or an Environmental Impact Statement ("EIS"). JA Vol. 24 at 4708; JA Vol. 25 at 4783. Obviously, should mitigation measures trigger NEPA compliance, an extended period of time would be required to comply with NEPA before such mitigation measures could be put

[11] This calculation does not include claims to vested rights in Kobeh Valley that had not been filed with the STATE ENGINEER at the time of the 2010 hearing. No calls for proofs of claims have been made so no notice has been provided for claimants of vested rights to bring claims forward. See NRS 533.095.

into effect and the approval and ability to legally complete such mitigation measures would be removed from the control of both KVR and the STATE ENGINEER.

Finally, there is nothing in the record to support the Respondents' assertion that based upon the mitigation ordered in this case "senior rights holders . . . will receive the same amount of water, at the same point of diversion and place of use and during the same period of time, as they would have received in the absence of the new appropriation." See KVR's Answering Brief at page 22. In fact, the types of mitigation proposed by KVR (i.e., hauling water in, piping water in, etc.) are inapposite to KVR's assertion that the senior appropriators will receive the same amount of water, at the same point of diversion and place of use during the same period of time. Nowhere in the STATE ENGINEER's Ruling 6127 does the STATE ENGINEER articulate what mitigation will encompass.

It is worth repeating, EUREKA COUNTY has argued that the STATE ENGINEER does not have the authority by law to require future mitigation when applications conflict with existing rights. If this Court identifies such authority, then the duly developed and approved mitigation plan must be part of the administrative record to protect the senior water rights holders.

c. KVR's Argument that Impacts to Vested Rights Can Be Mitigated is Contrary to Nevada Law.

In its Answering Brief, KVR attempts to diminish the importance of vested rights. Vested water rights are those already established through diversion and beneficial use prior to the enactment of any statutory water law. See Andersen Family Associates v. Ricci, 124 Nev. 182, 188-89, 179 P.3d 1201, 1204-05 (2008) (concluding that although prestatutory vested rights may be subject to state regulation, such regulation may not impair the quantity or value of the vested rights). Nevada's nonimpairment statute of vested rights is set forth at NRS 533.085. NRS 533.085(1) mandates that the right to use the water must be the same. Therefore, KVR's contention that the STATE ENGINEER can just order mitigation to either have water hauled in or piped in to "fully mitigate" vested rights is wrong. The STATE ENGINEER cannot mitigate vested water rights. The STATE ENGINEER is prohibited by law from impairing vested water rights or their use.

5. KVR is Mischaracterizing the Record When It Claims that the Kobeh Valley Ranchers Conceded that Mitigation of Their Existing Rights was Possible.

KVR asserts in its Answering Brief that the Kobeh Valley ranchers "each conceded that mitigation of their valley floor water rights was possible." See KVR's Answering Brief at page 31. This assertion is false. A complete and

honest review of the testimony of each Kobeh Valley rancher shows that each rancher was doubtful that their senior water rights could be adequately and fully mitigated. JA Vol. 4 at 626-632 (testimony of Martin Etcheverry), 645-648 (testimony of John Colby), 664-669 (testimony of Jim Etcheverry). For example, a review of the entire cross-examination exchange between KVR's counsel and John Colby, the president of MW Cattle Company, shows Mr. Colby's position and hesitation to agree that mitigation would be effective:

> Q. Getting back to [m]itigation and the stock watering, I understand your concern about continued maintenance if you put in a well or deepen – put a pump in an artesian well. But would you still agree that mitigation is possible to put in some sort of pump system to –
>
> A. Well, it would be but what would you do about the lost pasture. What would you do about that? I mean because if you lower the water table I'm not going to have the grass.
>
> Q. My question was just about the stock watering rights that you have in the flat as far as mitigating those, putting in pump wells, stock watering. Would that allay your concerns?
>
> A. You know, anything will help, you know, and like I said, but the thing is if a guy puts those in there you need to have them in there before you lower the water because you can't tell the cows, you know, wait three weeks and I'll get you some water. They kind of need it now.
>
> Q. Understood. This will just get back in to if General Moly had the ranch to maintain these wells stock water for --- This just gets back to the maintenance on pumping, mitigating impacts to stock water wells, putting in pumps, putting in a system that can be maintained by the company without any work on your part. Would that allay your concerns with regard to the stock water rights?

A. Down low it would. But what about on the, up on the mountain?

Q. I'm just talking about on the lower end of your ranch.

A. Well, you know, the mountain is pretty good pasture. That's where, you know – And yeah, that would help down there.

JA Vol. 4 at 646-648. Obviously, this is not the testimony of a Kobeh Valley rancher conceding that mitigation would be effective as KVR would have this Court believe.

Gary Garaventa, the owner of ranch land and groundwater rights located near the proposed place of use, testified before the STATE ENGINEER that piping in water from the distribution system to troughs would not be feasible for stockwatering purposes. JA Vol. 4 at 676. Mr. Garaventa described his previous experiences with mitigation as follows:

> I've seen in different instances where they furnished water from places where they've been mining different mines and went ahead and took the water that was involved in their operation or that was coming up their stream that existed, pipe it down to some troughs to make water available for the wild horses and the livestock and wildlife in the area, sure, I've seen that. It was fine until the temperatures got below freezing and them waters freeze. And the two instances I know they weren't – sure they supplied water to the troughs but it wasn't accessible for the wildlife and the animals in the area because of the ice on the trough.

JA Vol. 4 at 676 (emphasis added).

Even though KVR incorrectly asserts that the Kobeh Valley ranchers each conceded that mitigation was possible, it is apparent that the STATE ENGINEER did not rely on any of the ranchers' testimony to support his conclusion that mitigation would be effective because he did not cite to any of that evidence in Ruling 6127. JA Vol. 36 at 5005-5006, 5011. KVR cannot make findings the STATE ENGINEER did not make.

6. KVR is Misrepresenting the Arguments and Evidence Presented to the STATE ENGINEER When It Claims that EUREKA COUNTY Advocated for a Monitoring, Management, and Mitigation Plan to Protect Against Known Impacts.

In its Answering Brief, KVR asserts that EUREKA COUNTY "can hardly complain" on appeal since the STATE ENGINEER did what EUREKA COUNTY asked—he ordered that a monitoring, management, and mitigation plan be developed and that EUREKA COUNTY be allowed to participate in its development. See KVR's Answering Brief at page 35. This is not what EUREKA COUNTY argued before the STATE ENGINEER.

At the 2010 hearing before the STATE ENGINEER, EUREKA COUNTY insisted on a monitoring, management, and mitigation plan to capture data in Kobeh Valley to deal with the potential ***unknown*** impacts resulting from KVR's pumping. JA Vol. 5 at 890; JA Vol. 14 at 2474-2492; JA Vol. 24 at 4681. To

protect Kobeh Valley from potential ***unknown*** impacts, EUREKA COUNTY requested involvement in the development of a monitoring, management, and mitigation plan. JA Vol. 5 at 886-891. In fact, EUREKA COUNTY submitted a proposed monitoring, management, and mitigation plan to the STATE ENGINEER which was designed to address the potential ***unknown*** impacts to senior water rights holders as a result of the mining operations. JA Vol. 14 at 2474-2492. EUREKA COUNTY's proposed monitoring, management, and mitigation plan was not designed to address the ***known quantified*** impacts to senior water rights resulting from KVR's proposed pumping because EUREKA COUNTY argued before the STATE ENGINEER that KVR's Applications that conflicted with existing senior water rights must be rejected as required by NRS 533.370(2). JA Vol. 2 at 192-194, 200; JA Vol. 14 at 2474-2492; JA Vol. 24 at 4681.

E. KVR's Legal Analysis of NRS 533.370(2) is Wrong Because the STATE ENGINEER Does Not Have "Inherent Authority" to Conditionally Approve Applications That Conflict With Existing Rights Based on a Future, Undefined Mitigation Plan That Was Not Part of the Record.

In its Answering Brief, KVR argues that the STATE ENGINEER has "inherent authority" to condition approval of applications on mitigation measures to protect existing rights. According to KVR, this inherent authority derives from

the STATE ENGINEER's "statutory authority" to deny applications that impair existing rights. "The power to disapprove necessarily includes the power to grant conditional approval." See KVR's Answering Brief at page 12.

The source of the "inherent authority" that KVR is referring to is actually a "statutory mandate" pursuant to NRS 533.370(2) that the STATE ENGINEER "shall reject" applications that conflict with existing rights or with protectable interests in domestic wells. See Pyramid Lake Paiute Tribe v. Ricci, 126 Nev. ___, ___, 245 P.3d 1145, 1146 (2010).

It is clear that NRS 533.370(2) mandates that "the State Engineer shall reject the application and refuse to issue the requested permit" under the following circumstances: "[(1)] where there is no unappropriated water in the proposed source of supply, or [(2)] where its proposed use or change conflicts with existing rights, or [(3)] with protectable interests in existing domestic wells as set forth in NRS 533.024, or [(4)] threatens to prove detrimental to the public interest." (Emphasis added.) Therefore, regardless of whether water is available for appropriation, the junior appropriator is precluded from interfering with the rights of the senior appropriator. See Desert Irrigation, Ltd., v. State of Nevada, 113 Nev. 1049, 1051 n.1, 944 P.2d 835, 837 n.1 (1997).

Here, water is not available in the source free from the claims of others with earlier appropriations and KVR's Applications as configured should have been rejected by the STATE ENGINEER in accordance with NRS 533.370(2). Although Ruling 6127 acknowledges that "certain water rights on springs in Kobeh Valley are likely to be impacted by [KVR's] proposed pumping" and that "[w]ater level drawdown due to simulated mine pumping is thoroughly documented," the STATE ENGINEER nevertheless granted KVR's Applications to pump 11,300 afa of water to the detriment of the holders of existing water rights. JA Vol. 26 at 5002, 5005-5006, 5026. Because Nevada adheres to the prior appropriation doctrine and the "first in time, first in right" model, the STATE ENGINEER does not have the authority to grant KVR's proposed use or change at the expense of existing water rights holders.

1. KVR's Assertion that the STATE ENGINEER's Interpretation of NRS 533.370(2) is Entitled to Deference Must Be Rejected Because the STATE ENGINEER Failed to Apply the Plain Language of the Statute to the Facts of this Case.

According to the STATE ENGINEER, his interpretation of NRS 533.370(2) is that "impacts" always happen, but "conflicts" only happen when a water source is eliminated. See STATE ENGINEER's Answering Brief at pages 15-16. Further, the STATE ENGINEER asserts that the basin has to be over appropriated

before there is a conflict. "In a fully-appropriated groundwater basin, it would be appropriate for the State Engineer to find that new appropriations would conflict with existing rights." See STATE ENGINEER's Answering Brief at page 20.

KVR argues that the STATE ENGINEER's interpretation above of NRS 533.370(2) is, "at a minimum, reasonable, and it is therefore entitled to deference." See KVR's Answering Brief at page 22. KVR's argument is without merit because this Court has the authority to undertake an independent review of the STATE ENGINEER's statutory construction, without deference to the STATE ENGINEER's determination. See Anderson Family Associates v. Ricci, 124 Nev. 182, 186, 179 P.3d 1201, 1203 (2008).

Whether or not the basin is over appropriated does not define a conflict as the STATE ENGINEER and KVR assert. In its Answering Brief, KVR attempts to distinguish the holdings in Griffin v. Westergard, 96 Nev. 627, 615 P.2d 235 (1980), and State Engineer v. Morris, 107 Nev. 699, 701, 819 P.2d 203, 204 (1991), which discuss NRS 533.370(2), from the facts of this case because the basins in Griffin and Morris were over appropriated. See KVR's Answering Brief at page 25. See also STATE ENGINEER's Answering Brief at pages 16-17, 20. Irrespective of whether there is water available in the source for appropriation (which is just the first factor to be satisfied under NRS 533.370(2)), the proposed

use or change must not conflict with existing rights or with protectable interests in existing domestic wells (being the second and third factors to be satisfied under NRS 533.370(2)). Accordingly, even though water may be available for appropriation, a junior appropriator may not locate its wells in close proximity to existing water rights such that the existing water rights dry up or cease to flow. In fact, the STATE ENGINEER acknowledges the multi-factor analysis required under NRS 533.370(2) in Ruling 6127. JA Vol. 26 at 4997, 5022.

Pursuant to NRS 533.370(2), the burden is on KVR to show no conflicts with existing water rights. As part of the application process, KVR had the burden of showing that existing rights will not be impaired as a result of KVR's pumping. In an attempt to eliminate conflicts, KVR could change the location of its well field so that its wells are (1) not in close proximity to existing water rights in Kobeh Valley or (2) sufficiently far to remove the conflict or (3) in natural ET groundwater discharge areas to remove water not used by other water sources with associated rights. In the alternative, KVR could reduce the size of its project, which currently requires 11,300 afa of water, or improve water use efficiency so as not to impair existing water rights in Kobeh Valley. JA Vol. 5 at 890. Further, the STATE ENGINEER could have approved staged development of water by

allowing KVR to pump in stages to determine the resulting impacts as advocated by EUREKA COUNTY. JA Vol. 2 at 194; JA Vol. 25 at 4915, 4917-4918, 4921.

2. KVR's Interpretation of NRS 533.370(2) Allows Conflict When the Prior Appropriation Doctrine and Plain Reading of the Statute Prohibits Approval of Applications That Conflict With Existing Water Rights.

In its Answering Brief, KVR argues that its interpretation of NRS 533.370(2) is consistent with the prior appropriation doctrine in that senior water rights holders will receive the full use of their water rights before KVR—being the junior appropriator—is entitled to take water. See KVR's Answering Brief at page 17. KVR's assertion that senior water rights holders must rely on a future, undefined mitigation plan that is not part of the record to protect their senior water rights is contrary to the prior appropriation doctrine.

Nevada is a prior appropriation state that only allows the STATE ENGINEER to grant a water right application if the appropriation does not interfere with earlier, more senior appropriations. See Desert Irrigation, 113 Nev. at 1051 n.1, 944 P.2d at 837 n.1. Accordingly, the STATE ENGINEER must not grant a permit to appropriate water if the proposed permit would conflict with existing rights. See NRS 533.370(2).

In its Answering Brief, KVR asserts that the out-of-state cases cited by EUREKA COUNTY in its Opening Brief should be disregarded by this Court

because they "add little to the discourse."[12] See KVR's Answering Brief at page 26. According to KVR, the out-of-state cases should be rejected by this Court because none of the cases granted applications conditioned on mitigation to protect existing rights. KVR's assertion is accurate in that mitigation was not discussed in these cases. Rather, the courts in these jurisdictions made holdings that support EUREKA COUNTY's position in this appeal, i.e., applications which interfered with existing rights were rejected.

KVR argues that the holding in United States v. Alpine Land & Reservoir Co., 919 F. Supp. 1470 (D. Nev. 1996), supports its assertion that the STATE ENGINEER has the inherent authority to condition his approval of applications on mitigation. KVR's reliance on Alpine Land, however, is misplaced because the STATE ENGINEER's approval in Alpine Land was not conditioned on mitigation. In Alpine Land, there was never going to be a conflict with senior water rights holders because the STATE ENGINEER made approval of the change applications "null and void if any attempt is made to drill wells and irrigate, from a

[12] In its Opening Brief, EUREKA COUNTY cited to case law from other states with similar statutes to support its position that applications proposing conflicts with existing rights must be denied. See Heine v. Reynolds, 367 P.2d 708, 710 (N.M. 1962); City of Albuquerque v. Reynolds, 379 P.2d 73, 81 (N.M. 1962); Piute Reservoir & Irr. Co. v. W. Panguitch Irr. & Reservoir Co., 367 P.2d 855, 858 (Utah 1962). See also EUREKA COUNTY's Opening Brief at pages 37-39.

groundwater source, the land being stripped of water." Alpine Land, 919 F. Supp. at 1473 (emphasis added). Thus, the holding in Alpine Land reaffirms the statutory mandate of NRS 533.370(2) that applications that conflict with existing rights cannot be approved.

Additionally, KVR cites to City of Reno v. Citizens for Cold Springs, 126 Nev. ___, ___, 236 P.3d 10, 16 (2010), to support its assertion that since a city's conditional approval of a master plan was upheld by this Court, so should this Court recognize the alleged inherent authority of the STATE ENGINEER to grant conditional approval of KVR's Applications. This Court's holding in Citizens for Cold Springs, however, does not support KVR's assertion that conditional approval may be based on a future, undefined plan that is not part of the record.

In Citizens for Cold Springs, a master plan amendment and adoption of zoning ordinance case, this Court held that administrative bodies required to make findings cannot defer making required findings to a later date or make broad, evasive conclusions about future actions to be taken. Citizens for Cold Springs, 126 Nev. at ___, 236 P.3d at 18-19. This Court stated that "more than the deferral of the issue or broad, evasive conclusions about how officials can build or expand utilities" was required when the Court reviewed the section of a governmental entity's order addressing the plan to meet future water demand and

infrastructure needs. Id. Thus, this Court's holding in Citizens for Cold Springs does not support KVR's argument but instead stands for the proposition, as asserted by EUREKA COUNTY, that the STATE ENGINEER may not defer a required finding based on broad and evasive conclusions regarding a future, undefined mitigation plan that is not part of the record.

Further, this Court's holding in Citizens for Cold Springs is consistent with long standing case law regarding the standards for judicial review of administrative decisions. Specifically, administrative decisions are reviewed to determine if they are based on substantial evidence and are not arbitrary and capricious, which is defined as being, in part, "baseless or despotic." City of Reno v. Estate of Wells, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994). By its very nature, reliance on broad and evasive conclusions about future actions to be taken fits within the basic concept of being baseless or despotic because such future reliance is unsupported by known reason or fact. Therefore, it is arbitrary and capricious for the STATE ENGINEER to conclude that quantified known and undisputed impacts can be mitigated in the future based on a future, undefined plan that is not part of the record and is thus unknown.

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F. NRS 534.110 and NRS 533.024(1)(b) Do Not Support Respondents' Argument That the STATE ENGINEER Has the Authority to Grant Applications That Conflict With Existing Rights.

Respondents argue that NRS 534.110 and NRS 533.024(1)(b) support the STATE ENGINEER's interpretation of his alleged inherent authority to grant applications that conflict with existing rights so long as those rights are protected through mitigation. See STATE ENGINEER's Answering Brief at pages 16-17; see also KVR's Answering Brief at pages 26-28. This argument is meritless. First, NRS 534.110 and NRS 533.024(1)(b) apply to groundwater and not surface water.

Second, NRS 533.024(1)(b) involves groundwater users and protects domestic wells from "unreasonable adverse effects which are caused by municipal, quasi-municipal or industrial uses and which cannot be reasonably mitigated." NRS 533.024(1)(b) does not list mining and milling uses as acceptable uses to be mitigated. In this appeal, all of KVR's Applications approved by the STATE ENGINEER are for mining and milling uses. JA Vol. 26 at 4985-4988. Therefore, Respondents' reliance on NRS 533.024(1)(b) to support the argument that the STATE ENGINEER has the authority to grant mining and milling applications that conflict with domestic wells based on mitigation is baseless.

Third, although KVR asserts that the STATE ENGINEER was not required to include additional "express conditions" to comply with NRS 534.110(5), KVR

argues that the STATE ENGINEER did impose express conditions because Ruling 6127 and the permits are "subject to existing rights" and on a monitoring, management, and mitigation plan that has yet to be developed. See KVR's Answering Brief at pages 29-30. KVR argues that the "subject to existing rights" phrase found in Ruling 6127 and the permits is sufficient to protect existing water rights. See KVR's Answering Brief at pages 19-20, 26.

The "subject to existing rights" language appears in every permit to appropriate water issued by the STATE ENGINEER. See NRS 533.430(1). Further, NRS 533.030(1) states that "[s]ubject to existing rights, and except as otherwise provided in this section, all water may be appropriated for beneficial use as provided in this chapter and not otherwise." Accordingly, the "subject to existing rights" language does not supplant the mandates of NRS 533.370(2). Rather, such language reinforces Nevada water law and the prior appropriation doctrine that a junior appropriator's proposed pumping may not conflict with existing rights. The STATE ENGINEER quoted the following in his Answering Brief:

> It is the very essence of the doctrine of prior appropriation that as between persons claiming water by appropriation, he or she has the best right who is first in time, and that the prior appropriator is entitled to the water to the extent appropriated to the exclusion of any

> subsequent appropriator. 79 Am. Jur. 2d Waters §351 (2002) (emphasis added).

See STATE ENGINEER's Answering Brief at page 35. The prior appropriation doctrine espoused by the STATE ENGINEER requires that existing rights are entitled to their water to the extent appropriated "to the exclusion of any subsequent appropriator," not that junior appropriators are entitled to water "subject to existing rights." In Ruling 6127, the STATE ENGINEER failed to apply the prior appropriation doctrine based on the evidence presented to him. Respondents' failure to cite to any relevant statutory authority to support their position shows that there is no statute giving the STATE ENGINEER the inherent authority to conditionally approve applications which violate NRS 533.370(2). Even if the STATE ENGINEER has statutory authority to approve applications in the manner the Respondents assert, the STATE ENGINEER has done nothing to promulgate rules or regulations to define, guide or direct mitigation.

1. Respondents' Assertion that the STATE ENGINEER Can Stop or Curtail Pumping After the Impact Stage Does Not Protect Existing Water Rights.

Respondents assert that the STATE ENGINEER retains the right to regulate water use at any time and can stop or curtail pumping if existing rights are impacted. If the mere fact that the STATE ENGINEER could curtail or stop pumping pursuant to NRS 534.110(6) was sufficient to allow applications to be

granted, then the requirements of NRS 533.370(2) would be rendered meaningless since all applications could be granted, despite the fact that they would conflict with existing rights, in reliance on future curtailment. Respondents' argument places senior water rights holders in the unenviable position of waiting until their water rights are potentially dried up or cease to flow and not mitigated before the STATE ENGINEER may take any action to protect their rights. Further, KVR and the STATE ENGINEER believe that after such an event occurs, a senior water right holder is protected because he may file a complaint with the STATE ENGINEER to receive his senior water rights. See STATE ENGINEER's Answering Brief at pages 35-36; KVR's Answering Brief at pages 39-40. This approach is in contravention of the mandates of NRS 533.370(2) and NRS 533.085 (Nevada's nonimpairment statute), undermines the prior appropriation doctrine, and necessitates future legal proceedings by senior water rights holders to protect their rights.

Additionally, although KVR argues in its Answering Brief that the STATE ENGINEER retains the power to curtail pumping if mitigation is not feasible, no evidence was presented to the STATE ENGINEER in the 2010 hearing regarding curtailing pumping as a viable mitigation measure. See KVR's Answering Brief at page 36. KVR acknowledged that if ordered by the STATE ENGINEER or a

court, it would stop pumping. JA Vol. 2 at 321, 329-330. Curtailment of pumping after impacts occur is not mitigation. Moreover, a discussion regarding curtailing pumping occurred in the October 2008 hearings where KVR's Technical Director and Project Manager testified that curtailment of pumping was not a mitigation option in this case. RA at 20-21, 26-27. KVR's Project Manager testified that it would not be feasible for KVR to stop pumping as a mitigation measure. RA at 27. KVR's Director of Environmental and Permitting also testified that curtailment of pumping was not a feasible mitigation measure. RA at 28-34.

2. The STATE ENGINEER Failed to Use the Tools Already Available to Him in this Case.

Under the authority that the STATE ENGINEER already has, he could have ruled on KVR's numerous Applications on an application-by-application basis and rejected those Applications where the evidence showed quantified impacts to existing rights under NRS 533.370(2). In the alternative, the STATE ENGINEER could have delayed ruling on the Applications until further study of the basin was conducted to guard the public interest properly. See NRS 533.368; NRS 533.375.

Further, the STATE ENGINEER could have ordered staged development of water. See NRS 533.3705; JA Vol. 25 at 4915, 4917-4918, 4921. He could have ordered KVR to pump in quantified stages for set periods of time, determine the resulting conflicts or decrease in water flow and then take appropriate measures

based on a gradual development of the water resource to protect existing rights. See NRS 533.3705. The development of a monitoring, management, and mitigation plan is generally to assist the STATE ENGINEER in gathering data about the basin to determine and assess the effects of the proposed pumping in the basin. JA Vol. 26 at 5005. Because Kobeh Valley has never had groundwater pumping to this extent and for this type of consumptive use, it would have been prudent for the STATE ENGINEER to order staged development to protect the basin and existing water rights from impairment.

Finally, the STATE ENGINEER should have adjudicated the claims to vested and reserved rights in Kobeh Valley, or at least called for proofs of claims under NRS 533.095, to gain a better understanding of all existing rights in the basin.

G. Respondents' Arguments that the STATE ENGINEER Properly Considered and Applied the Correct Standard Under NRS 533.370(3) are Without Merit.

In its Answering Brief, KVR argues that the STATE ENGINEER need only "consider" whether the proposed interbasin transfer is environmentally sound. According to KVR, NRS 533.370(3) does not require the STATE ENGINEER to make a "finding" that the interbasin transfer is environmentally sound. See KVR's Answering Brief at page 41. Contrary to KVR's assertion, however, the STATE

ENGINEER did make such a finding in Ruling 6127 and apparently believes he is required to make such a finding under the statute. JA Vol. 26 at 5010-5011.

Although EUREKA COUNTY presented evidence to the STATE ENGINEER to show that the proposed interbasin transfer and KVR's pumping would negatively impact the hydrologic-related natural resources of Kobeh Valley, KVR presented no evidence regarding whether the interbasin transfer was environmentally sound and, thus, there was no evidence to support the STATE ENGINEER's finding. In Ruling 6127, the STATE ENGINEER only cited to the 2008 spring dataset and to no other evidence to support his finding that the proposed interbasin transfer is environmentally sound. JA Vol. 26 at 5011. See Wyoming Dep't of Transportation v. Legarda, 77 P.3d 708, 713 (Wy. 2003) (conclusory findings will not be upheld if the reviewing court is unable to determine upon which basis the conclusory findings were reached).

Nonetheless, KVR argues in its Answering Brief that "the District Court examined all of the evidence and upheld the State Engineer's findings concluding that they were supported by substantial evidence." See KVR's Answering Brief at page 45. The District Court erred in making such ruling because the only evidence presented to the STATE ENGINEER regarding whether the proposed interbasin transfer was environmentally sound was evidence presented by EUREKA

COUNTY that such proposed transfer was not environmentally sound and would unreasonably impact the hydrologic-related natural resources of Kobeh Valley.

In his Answering Brief, the STATE ENGINEER contends that the proposed interbasin transfer is environmentally sound because the amount of water to be appropriated by KVR is less than the perennial yield of Kobeh Valley, and he required a plan to monitor and identify potential impacts to water rights. See STATE ENGINEER's Answering Brief at pages 24 and 27. Further, the STATE ENGINEER argues that he has no expertise or staff "for the detailed analysis of impacts related to the mine project on the environment." See STATE ENGINEER's Answering Brief at page 25.

In this appeal, EUREKA COUNTY is not asserting that the STATE ENGINEER conduct an environmental study of the natural resources in Kobeh Valley. Rather, EUREKA COUNTY is merely stating that the STATE ENGINEER must apply his own standard as espoused in Ruling 6127—"whether the use of the water is sustainable over the long-term without unreasonable impacts to the water resources and the hydrologic-related natural resources that are dependent on those water resources"—to the evidence presented before him. JA Vol. 26 at 5010 (emphasis added).

In Ruling 6127, the STATE ENGINEER failed to consider and discuss the hydrologic-related natural resources of Kobeh Valley that are dependent on the water resources. At the very least, the STATE ENGINEER should have sufficiently considered the hydrologic-related natural resources of Kobeh Valley that are dependent on the water resources before finding that such natural resources of Kobeh Valley would not be impacted. See Legarda, 77 P.3d at 713.

II.

CONCLUSION

Based on the foregoing, this Court should reverse the District Court's Order Denying Petitions for Judicial Review and vacate STATE ENGINEER's Ruling 6127. In accordance with NRS 533.370(2), the STATE ENGINEER had a statutory obligation to reject KVR's Applications that conflict with existing rights and refuse to issue the requested permits. Moreover, any permits issued by the STATE ENGINEER to KVR must be vacated.

A reversal on appeal does not mean, however, that KVR's project may not go forward. EUREKA COUNTY supports the responsible development of water. Despite any assertions that EUREKA COUNTY's statutory interpretation of NRS 533.370(2) would create a near impossibility for future development of any new groundwater in the State of Nevada, EUREKA COUNTY is not advocating that no

water can ever be developed in Kobeh Valley. Instead, EUREKA COUNTY maintains that the water be developed in a responsible manner by simply satisfying the legal requirements of NRS 533.370(2) so as to protect existing rights.

DATED this 5th day of April, 2013.

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CERTIFICATE OF COMPLIANCE (BASED UPON NRAP FORM 9)

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14 point Times New Roman type style.

2. I further certify that this brief does not comply with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 11,598 words. A motion and declaration to file a Reply Brief in excess of the type-volume limitation is submitted concurrently herewith.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 5th day of April, 2013.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1)(c), I hereby certify that I am an employee of ALLISON, MacKENZIE, PAVLAKIS, WRIGHT & FAGAN, LTD., Attorneys at Law, and that on this date, I caused the foregoing document to be served on all parties to this action by:

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